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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. THANH VIET CAO, Defendant and Appellant.	G041574 (Super. Ct. No. 07SF0145) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Glenda Sanders, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Thanh Viet Cao of attempted extortion (Pen. Code, §§ 518, 664)[1], making a criminal threat (§ 422), and misdemeanor carrying a loaded firearm in public (§ 12031, subds. (a)(1), (2)(G)). The court suspended imposition of sentence and placed defendant on probation on condition he serve 180 days in jail (with 45 days credit). On appeal defendant argues his attempted extortion and criminal threat convictions are unsupported by substantial evidence. We affirm the judgment.

FACTS

From 1986 through 1997, Anthony Amaradio was sued in at least nine separate cases for fraudulent misrepresentation in the sale of life insurance; he settled those cases. In 1992, the National Association of Securities Dealers fined and suspended Amaradio and ordered him to pay restitution to clients. Around that time, Amaradio stopped selling life insurance.

By 2005, Amaradio had switched to investment advising and was involved with two start-up companies as an equity shareholder and paid employee. He met defendant through Doug Lorenzen (Amaradio's former employee). Defendant was to raise start-up capital of $10 million dollars — $5 million dollars for each company.

Around the end of 2006, the two companies were shut down; one had failed and the other "was not going in the right direction." Amaradio had received compensation of $65,000 from one company. Other than that, Amaradio had "no idea" where the $5 million dollars for each company went. He did not know if the companies were ever legally formed or "ever got off the ground."

On December 16, 2006, Amaradio met with defendant, Lorenzen, Rob Kelly, and Pat Peele. Defendant "wanted to know how the two companies were doing."

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[1] All statutory references are to the Penal Code.

Kelly explained "that monies were being eroded in [one] company and there was only a small cushion left" of the start-up capital "because the other partners were spending the money improperly." Defendant demanded that the investors' loss "be split four ways between" Lorenzen, Amaradio, Kelly and himself, and that Amaradio and Kelly reimburse the company for their share of the losses with 8 percent interest by January 31. Amaradio replied "that was absurd." Defendant and Peele left the room, then returned and demanded that the company be shut down. Defendant asked "for all the records, the equipment, any monies left in the accounts immediately," and instructed that the companies were "not to go forward with any type of business activity [and] were to let people go." He "demanded the money by January 31st, because 'the family' would accept nothing else." Defendant and Peele then left the meeting.

Amaradio stayed and talked with Lorenzen and Kelly. Amaradio asked, "Who are these people?" because he was concerned "a crime organization" was involved. Amaradio felt very personally threatened.

On December 30, 2006, Amaradio tried to reason with defendant that if he "wanted to recover the monies . . . improperly spent by the other partners, that he should do it through proper legal channels." Defendant wanted Amaradio to pay Amaradio's and Kelly's share of the investors' losses, i.e., $1,560,000. Defendant stated he would be responsible for Lorenzen's share. Defendant replied "the family" wanted "their money by the end of January and that they would not wait to go through the court process to try and recover monies with the possibility they'd get nothing." Defendant said "the family would start with [Amaradio's] children," then kill his wife, and then Amaradio.

Amaradio was "terrified." He told his wife and daughters "so that they would be prepared if somebody tried to hurt them." He also told two attorneys about defendant's threats.

On January 2, 2007, Amaradio again met with defendant. Defendant told Amaradio about an incident where "they took a baby in front of the mother and father" "and chopped it up, then killed the wife in front of the father."

On January 5, 2007, Amaradio and the two attorneys met with defendant; defendant told the attorneys "it would be better if [they] had not been" there. Defendant proposed a solution: Amaradio was to open a bank account into which defendant would deposit money; Amaradio would then pay the money back to defendant's company, so it would "look like [Amaradio had] paid the money," and thereby satisfy the family. But if the family "ever found out [defendant did this], then they would kill" both Amaradio and defendant. "It looked to [Amaradio] like money laundering." Amaradio felt threatened.

Shortly thereafter, Amaradio phoned defendant. Defendant told Amaradio, "Tony, nothing is going to happen."

Amaradio phoned the police, who wired Amaradio's office.

On January 9, 2007, Amaradio met with defendant at Amaradio's office. (At trial the jury heard the recorded conversation.) Amaradio asked if "life threatening" "stuff" might happen. Defendant related a story: a person who had been robbing the Bicycle Casino for a year had been standing outside and "a guy dressed in plain clothes, out of nowhere just walked up to him, shot him in the head and walked away." The most frequent incidents were "fatal car accidents." Defendant said if Amaradio paid his share, "they're not going to come back," but if Kelly could not pay his share, his life would be "a living hell" until he did pay. Amaradio asked whether Kelly might "have a fatal car accident" if he did not pay? Defendant replied, "I hope not, but . . . something like that would probably happen." Defendant explained this was why, since he and Amaradio had the money, they should pay Kelly's share. He also stated "people aren't just murdered anymore, they're tortured." A man with two kids had to watch his infant daughter cut-up and his wife tortured. Defendant stated if Amaradio failed to pay, it would be taken from his checking account. Later, Amaradio again mentioned the chance of "physical

consequences," torture, or "hideous things" happening to his family and himself. Defendant said, "Yeah, I sure hope not. If it's just money then [it] probably won't go that far." Defendant again proposed to give Amaradio "an out" by wiring funds from defendant's company called California Gaming into Amaradio's personal account, from which Amaradio was to write a check to defendant's company called Think Financiers. Amaradio would not be "bother[ed] again," unless defendant "went through the books and saw that [Amaradio] did take money." When Amaradio asked if his daughter would be tortured, defendant said, "I didn't say I was going to do it. Of course not." Defendant told Amaradio it would be fatal for him (Amaradio) to meet the family and see their faces. Later, defendant said Kelly would "seal [his] own fate" if he went to the police.

Investigators followed defendant to a strip mall, arrested him, and found a loaded semi-automatic handgun in his laptop bag.

On February 12, 2007, defendant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and spoke with the police. (At trial, the taped interview was played for the jury.) Defendant stated he "said a lot of things because [he] was almost in a rage" about losing $3 million dollars "on the deal." He "almost went insane," "probably broke the law by all the things [he] said," and threatened "them." Defendant denied threatening to torture Amaradio's children, but did say he had heard in the news about the torture and murders of a Vietnamese family. Defendant admitted he wanted Amaradio to feel threatened so he would "come up with some money to pay back people."

Lorenzen testified for the defense that at the December 16 meeting, he never heard defendant threaten harm to Amaradio or his family. At one point, Amaradio kicked his feet up and said, "I'm untouchable," "You can't do anything," and "I'm not going to pay you." After defendant and Peele left the meeting, Amaradio seemed paranoid and nervous. He asked Lorenzen, "Who are these guys?" "[H]e was distraught because he got the sense that they must be . . . organized crime."

DISCUSSION

Defendant contends insufficient evidence supports his convictions for attempted extortion and making criminal threats. We decide claims based on insufficiency of the evidence by reviewing the entire record to determine whether "'a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Attempted Extortion

"Extortion is the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear . . . ." (§ 518.) Fear may be induced by the defendant's threat that someone (not necessarily the defendant personally) will unlawfully injure the person or property of the victim or a third person. (§ 519; *People v. Hopkins* (1951) 105 Cal.App.2d 708, 709-710.) A person who tries, by means of such a threat, to extort money or other property from another is guilty of attempted extortion. (§ 524.) "The elements of the crime of attempted extortion are (1) a specific intent to commit extortion and (2) a direct ineffectual act done towards its commission." (*People v. Sales* (2004) 116 Cal.App.4th 741, 749.) "Preparation alone will not establish an attempt. There must be '"some appreciable fragment of the crime committed [and] it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter . . . ."'" (*Ibid.*)

It is no defense to the crime of extortion that the defendant had a good faith claim to the extorted property. (*People v. Lancaster* (2007) 41 Cal.4th 50, 88.) "The law

does not contemplate the use of criminal process as a means of collecting a debt." (*People v. Beggs* (1918) 178 Cal. 79, 84.)

Defendant contends he did not try to extort Amaradio's own money from him. Instead, under the terms of defendant's proposed plan, Amaradio was to return defendant's own money to defendant.

The information, however, charged defendant with unlawfully attempting to extort money or property from Amaradio between the dates of December 30, 2006 to January 19, 2007. The evidence showed defendant did not propose his plan to Amaradio until January 5, 2007. Prior to that, at the December 30, 2006 meeting, defendant told Amaradio the family wanted "their money by the end of January" and that Amaradio was the deep pocket who was to give defendant $1,560,000. Defendant threatened that "the family would start with [Amaradio's] children, then take out [his] wife, then eventually move up to" Amaradio. Thus, substantial evidence shows defendant committed all of the elements of attempted extortion on December 30, 2006.[2] And the jury was properly instructed with the unanimity instruction, CALCRIM No. 1500, thusly: "The defendant is charged in Count 1 with attempting to commit extortion sometime during the period December 30, 2006 through January 19, 2007; the People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." Accordingly, substantial evidence supports the verdict.

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[2] The jury found defendant did not make a criminal threat under section 422 on December 30, 2006. But the requirements for a section 422 threat (discussed in more detail below) are greater than those for a threat underlying attempted extortion. For example, a section 422 threat must convey "an immediate prospect of execution of the threat." On December 30, 2006, defendant said the family wanted "their money by the end of January" 2007.

Criminal Threats

Section 422 forbids a person from willfully threatening "to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety."

"'"[T]he determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances.'"' (*People v. Mosley* (2007) 155 Cal.App.4th 313, 324.) "To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. The statute includes the qualifier 'so' unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) The "statutory definition of the crime proscribed by section 422 is not subject to a simple checklist approach to determining the sufficiency of the evidence. Rather, it is necessary first to determine the facts and then balance the facts against each other to determine whether, viewed in their totality, the circumstances are sufficient to meet the requirement that the communication 'convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.' This presents a mixed question of fact

and law. In considering the issue, we will defer to the trial court's resolution of the historical facts by viewing the evidence in a light most favorable to the judgment. In determining whether the facts thus established are minimally sufficient to meet the statutory standard, we must exercise our independent judgment." (*Ibid.*)

The jury — having heard a tape of the January 9, 2007 meeting between Amaradio and defendant — found defendant made a criminal threat(s) on that date. Defendant contends his stories about torture and car accidents "amounted to nothing more than angry utterances[,] ranting soliloquies," "mouthing off and posturing," and "did not convey a gravity of purpose and immediate prospect of the execution of a crime." He relies on *People v. Teal* (1998) 61 Cal.App.4th 277. There, the defendant, "using his shoulder as a battering ram, tr[ied] to smash open the front door" many times. (*Id.* at p. 280.) The defendant then "removed his jacket, wrapped it around his fist and tried to smash open a front window," yelling "'I'm going to kill you, you son of a bitch,'" and uttering "primal screams." (*Ibid.*) On appeal the defendant asserted that, due to the absence of evidence he knew the victim was home and could hear the threats, the evidence showed "no more than an angry catharsis, a ventilating monologue whose only purpose was emotional release not the conveying of a death threat to induce 'sustained fear.'" (*Id.* at p. 281.) The Court of Appeal agreed that "section 422 is not violated by mere angry utterances or ranting soliloquies, however violent. One may, *in private,* curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs — safe from section 422 sanction." (*Ibid,* italics added; see also *People v. Felix* (2001) 92 Cal.App.4th 905, 913 [§ 422 does not "punish emotional outbursts, it targets only those who try to instill fear in others"].) But *Teal* affirmed the defendant's conviction of making criminal threats because section 422 does not require "certainty by the threatener that his threat has been received by the threatened person." (*Teal,* at p. 281.) What is important is that the perpetrator "*broadcasts* a threat intending to induce sustained fear."

(*Ibid,* italics added.) Thus, even when words are spoken in anger and due to passion, they can constitute threats under section 422 if intended to induce fear in the victim.

Here, the jury heard ample evidence that defendant intended to frighten Amaradio into paying for part of the investors' losses. Defendant admitted as much in his interview. In addition, defendant's demeanor was "[v]ery cold, ruthless, businesslike, [and] matter of fact."

Defendant argues he talked about torture and car accidents only in response to Amaradio's questioning. But Amaradio did not encourage defendant to make threats, but rather asked open-ended questions seeking clarification, e.g., "[I]s it really life threatening or is it more like . . . ." Defendant offered detailed answers sufficient to invoke fear. In contrast, defendant refused to answer Amaradio's questions about the family and who they were.

Defendant further argues he directed one of his threats against Kelly, not Amaradio. In fact, defendant's statement was ambiguous: "[Kelly] won't see the light of day if (. . ?) That's the ultimate. If you want to talk about torture, there it is right there. You go to the cops, fine. Then you've sealed your own fate."

Finally, although defendant did state, "I didn't say I was going to it. Of course not," with respect to torturing Amaradio's teenage daughter, this was only one of the many statements made by defendant at the meeting. Nor was this statement inconsistent with harm being inflicted on Amaradio's daughter by the family.

In sum, substantial evidence supports defendant's conviction for making criminal threats.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.